

SERVICE DATE – APRIL 18, 2017

SURFACE TRANSPORTATION BOARD

Docket No. FD 36105

GENESEE & WYOMING INC.—ACQUISITION OF CONTROL EXEMPTION—ATLANTIC
WESTERN TRANSPORTATION, INC. AND HEART OF GEORGIA RAILROAD, INC.

Digest:¹ This decision grants Genesee & Wyoming Inc. authority to acquire control of Atlantic Western Transportation, Inc. (AWT), and indirect control of AWT's subsidiary Heart of Georgia Railroad, Inc.

Decided: April 12, 2017

On February 27, 2017, Genesee & Wyoming Inc. (GWI), a noncarrier holding company, filed a petition under 49 U.S.C. § 10502 and 49 C.F.R. Part 1121 for exemption from the provisions of 49 U.S.C. §§ 11323-24 to allow GWI to acquire control of Atlantic Western Transportation, Inc. (AWT), a noncarrier holding company, and indirect control of AWT's wholly owned subsidiary Heart of Georgia Railroad, Inc. (HOG), a Class III railroad. The Board will grant GWI's petition for exemption, subject to standard labor protective conditions.

BACKGROUND

GWI is a publicly traded noncarrier holding company that currently controls, through direct or indirect equity ownership, two Class II carriers and 107 Class III carriers operating in the United States. (Pet. 1.) HOG is a Class III carrier based in Americus, Ga., that leases from the Georgia Department of Transportation (Georgia DOT) and operates approximately 221 miles of rail lines in Georgia and Alabama. (Id. at 2.)

GWI states that it seeks to acquire control of HOG through the acquisition of the stock of AWT, the noncarrier parent company of HOG.² (Id.) Upon consummation, GWI would acquire direct control of AWT, and, because HOG is a wholly owned subsidiary of AWT, GWI would acquire indirect control of HOG. (Id.) HOG connects with several railroads, including two GWI

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² GWI states that it and the individual shareholders of AWT have entered into a Stock Purchase Agreement dated February 7, 2017. (Pet. 2.) GWI further states that it expects to consummate the transaction after all of the closing conditions have been satisfied as set forth in the Stock Purchase Agreement, including the grant of this exemption from the Board, and that it hopes to consummate the transaction in the second fiscal quarter of 2017. (Id. at 5.)

subsidiaries: Georgia Southwestern Railroad, Inc. (GSR) and Georgia Central Railway, L.P. (GC). (Id. at 3.) GWI states that, although there are some commonly served cities where the railroads connect, there are no customers that are served by GSR or GC, on the one hand, and HOG, on the other, and that as such there would be no “2-to-1 customers” as a result of the proposed transaction. (Id.) GWI further states that the joint line movements (which already currently exist) between HOG and the GWI-affiliated railroads would not be used to foreclose vertical competition over efficient joint line routes with unaffiliated carriers. (Id.)

GWI states that it does not contemplate any material changes to HOG’s operations, maintenance, or service, and that HOG would continue to operate as a separate railroad, though HOG’s senior managers would report to a senior vice president of Genesee & Wyoming Railroad Services, Inc., an affiliate of GWI. (Id. at 3, 4.) GWI states that no shippers would lose access to direct or indirect Class I connections, nor to any short line connections, or lose any service options. (Id.) GWI states that, as a result of this proposed transaction, HOG and its shippers would benefit from greater coordination and efficiencies, enhanced financial resources, more robust management support for operations and safety, and a broader set of relationships with national customers. (Id. at 4.) Georgia DOT does not oppose the transaction and asks the Board to review and approve the transaction expeditiously. (Id. at Ex. D.) No shippers have filed comments.

DISCUSSION AND CONCLUSIONS

The acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers requires approval by the Board pursuant to 49 U.S.C. § 11323(a)(5). Under § 10502(a), however, the Board must exempt a transaction or service from regulation if it finds that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either the transaction or service is limited in scope, or regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of §§ 11323-24 is consistent with the standards of § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under §§ 11323-24 is not necessary here to carry out the RTP. Approval of the transaction would result in a change in ownership of AWT and control of HOG with no lessening of competition. An exemption would promote the RTP by: minimizing the need for federal regulatory control over the transaction, § 10101(2); ensuring the development and continuation of a sound rail transportation system that would continue to meet the needs of the public, § 10101(4); fostering sound economic conditions in transportation, § 10101(5); reducing regulatory barriers to entry, § 10101(7); encouraging efficient management, § 10101(9); and providing for the expeditious resolution of this proceeding, § 10101(15). Other aspects of the RTP would not be adversely affected.

Nor is detailed scrutiny of the proposed transaction necessary to protect shippers from an abuse of market power. According to GWI, no shipper would lose any rail options, and operations would not materially change. (Pet. 9.) Although HOG connects with two GWI-owned carriers (GSR and GC), GWI states that there would be no 2-to-1 shippers as a result of the acquisition. (Id. at 10.) In addition, GWI states that HOG also connects directly with two

Class I carriers (CSX Transportation, Inc. and Norfolk Southern Railway Company). (*Id.*) The Board will hold GWI to its statement that existing joint line movements between HOG and the GWI-affiliated railroads would not be used to foreclose vertical competition over efficient joint line routes with unaffiliated carriers. (*See id.* at 3.) Accordingly, based on the record, the Board finds that this transaction does not shift or consolidate market power; therefore, regulation is not necessary to protect shippers from the abuse of market power.³

Labor Conditions

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Because GWI currently controls two Class II carriers⁴ and numerous Class III carriers, any employees adversely affected by this transaction will be protected by the conditions set forth in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C. 60 (1979). *See* 49 U.S.C. § 11326(a).

GWI, acknowledging that New York Dock applies, seeks Board confirmation that neither GWI nor HOG need to commence negotiations or consummate implementing agreements prior to the consummation of the control transaction. (Pet. 10-11.) New York Dock requires a railroad to give notice of “proposed changes to be effected by [a] transaction” when a railroad is “contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction” that may affect employees. 360 I.C.C. at 77. The requirement under New York Dock to provide such notice presumes, however, that the carrier is capable of making a “full and adequate statement” of the expected labor changes before the transaction is consummated. Norfolk S. Ry—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC (Pan Am S.), FD 35147, slip op. at 16-17 (STB served Mar. 10, 2009) (“Because we see no basis for negotiation of an implementing agreement until Applicants decide to implement labor changes that are related to the Transaction, we will not require that Applicants commence negotiations now.”).

GWI states that it has not yet determined whether or which employees may be adversely affected, but acknowledges that it would be required to give 90-days’ notice and negotiate before making changes in operations, services, facilities, or equipment,⁵ but that it would not immediately terminate or displace any HOG covered employees as a result of the proposed transaction, and that HOG would continue to honor all current employment terms and conditions.

³ As there is no evidence that regulation is needed to protect shippers from the abuse of market power, we do not need to determine whether the transaction is limited in scope. *See* 49 U.S.C. § 10502(a).

⁴ Buffalo & Pittsburgh Railroad, Inc. and Rapid City, Pierre & Eastern Railroad, Inc. (Pet., Ex. A at 1.)

⁵ GWI states that none of HOG’s 15 current employees are subject to collective bargaining agreements, and thus there are no unions with which to negotiate implementing agreements. (*Id.* at 10.) The Board notes that GWI will still be required to complete any New York Dock negotiations directly with affected HOG employees.

(Pet. 10-11.) The Board will hold GWI to these representations. Accordingly, GWI will be required to proceed in good faith under the notification and negotiation provision of Article I, section 4 of the New York Dock conditions before implementing employment changes, but it need not commence those negotiations until it is capable of making a full and adequate statement of the expected changes. See Pan Am S., FD 35147, slip op. at 16-17. See also Genesee & Wyo., Inc.—Acquis. of Control Exemption—Providence & Worcester R.R., FD 36064, slip op at 7 (STB served Dec. 16, 2016).

Environmental and Historical Reporting

This transaction is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts GWI's acquisition of control of AWT and HOG from the prior approval requirements of §§ 11323-24 subject to the employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).
2. GWI must adhere to its statement that existing joint line movements between HOG and the GWI-affiliated railroads will not be used to foreclose vertical competition over efficient joint line routes with unaffiliated carriers.
3. Notice will be published in the Federal Register.
4. This exemption will be effective on May 18, 2017.

By the Board, Board Members Begeman, Elliott, and Miller.